United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1404

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
GRETCHEN WHITE OBERMAN

UNITED STATES OF AMERICA :

Appellee, :

-against- :

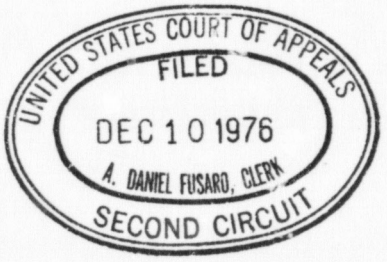
HARRY LEVINE BENSON, HERBERT KAMINSKY and MARI-ANN DANISE, :

Defendants-Appellants. :

B P/S

On Appeal From A Judgment Of The
United States District Court
For The Southern District of New York

Reply Brief For
Appellant Herbert Kaminsky



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UNITED STATES COURT OF APPEALS
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Reply Brief For
Appellant Herbert Kaminsky

This brief is submitted in reply to respondent's brief filed with the Court on December 4, 1976.

1. Answering The Government's Indiviglio Argument.

At three different points in its brief, the Government makes a waiver argument based on United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965) which is specious. At page 11, it contends that appellant waived the continuance issue by failing to request a continuance in order to obtain the Barth testimony; at pages 28-29, that the appellant waived the statuatory construction issue by failing to request a charge that the jury must find Buhler owned the two precious stones in order to convict; and at page 35, that appellant waived any error regarding the trial judge's refusal to disclose to

the jury that appellant had never been indicted or convicted of the alleged similar criminal acts by failing to except to the judge's charge.

This waiver argument, predicated upon United States v. Indiviglio, supra, is specious because it overlooks the fact that the trial court below was made fully aware of appellant's position with respect to each of these three points by an objection, or request, stating with "a reasonable degree of specificity" (Indiviglio, supra, at 279) the ground upon which the objection or request was based.

The request for a continuance to obtain Barth's testimony was argued at length in this joint trial primarily by counsel for the co-defendant Benson. Why each defendant has, individually, to re-argue the same point and obtain, individually, the same adverse ruling in order to preserve such an issue on appeal is not readily apparent -- unless the Government wants to multiply the time necessary to try any multi-defendant case by the number of defense counsel times the number of objections.

Additionally, the best proof that the Government's waiver claim is specious is its own position on the continuance issue at trial. Each time it responded to the arguments for a continuance to obtain Barth's testimony, it did so by characterizing its response

as one addressed to arguments of the defendants.* Having recognized at trial when the continuance arguments were being made that they had been made on behalf of all the defendants, it can hardly come as a surprise that all defendants, on this appeal, continue to contend that the trial court's denial of their continuance motion was error.

The statutory construction issue -- that Section 2314 does not apply in a case where property is obtained by false pretense from one not in rightful possession -- was raised after both sides rested, in the course of the trial court's rulings on requests to charge and on defense motions to dismiss under Rule 29. (A.142-143) Counsel for Benson stated:

> "It is our contention that under the laws enacted by Congress . . . that unless one can be shown either to be the true owner or the possessor with the full knowledge and authority of the true owner, that one does not come within the protection which these laws have set forth . . ." (A.143)

Once again, why this same speech had to be repeated twice more by counsel for the co-defendants and why each of the three defense counsel had to repeat it again in the form of a requested instruction, and again as an exception to the charge in order to preserve the error on appeal, is not readily apparent under the Indiviglio,

* See especially, A.104 (". . . all of the arguments that are being made here are defendants' arguments for summation . . ."); A.105 (". . . the defendants have . . . failed . . ."); A.124 (". . . that the defendants make an offer of proof . . ."); A.124 ("Once the defendants have complied . . .").

supra, rationale.

Additionally, in United States v. Rodriguez, 465 F.2d 5 (2d Cir. 1972), the same waiver argument made by the Government in this case was rejected by this Court. In Rodriguez, defense counsel moved to dismiss on the ground of lack of venue and argued the venue issue in other contexts during trial, but did not request a jury instruction or except to the charge given on venue. This Court held that it was "evident" that the trial court "was fully aware of the defense position" with respect to this issue, and hence that sufficient objection was made to the theory of venue instructed on by the trial court to preserve the question for appellate review. 465 F.2d at 8-9.

Under the Rodriguez, supra, holding, and under Indiviglio, supra, the specific defense request below for an instruction that appellant had not been indicted or convicted of the criminal acts testified to by Isaac Pollok (set out in full at A.141) was also sufficient to preserve that issue for review in this Court. It stated "with a reasonable degree of specificity" the ground for the request, and it was also "evident" that the trial court was "fully aware of the defense position" on this issue once the request was made.

2. Answering The Government's Argument Concerning The Timing Of The Request For A Continuance.

The Government takes the simplistic position that since defense counsel were or should have been on notice that Buhler claimed he purchased the diamond from Barth prior to trial, the trial court properly denied the requested five-day continuance to obtain Barth's deposition. Not only is this not a basis -- in and of itself and without regard for the materiality of the testimony sought -- to deny a continuance, but the argument also ignores the record on how and when the need for Barth's testimony first became apparent.

The first hint that there was any issue on Buhler's ownership of the diamond came only after Buhler began to testify. Before Buhler took the stand, the defense could assume that the Government would be able to substantiate its categorical promise to "prove beyond any question that [Buhler] was the legitimate owner of those two very valuable jewels". (A.145) Consistent with the Government opening, the indictment also had alleged that the stones were Buhler's property (A.4); the 3500 material bore out the Government's contention that Buhler was the legitimate owner; as did the deposition in the civil case. On the basis of all facts known to the defense before trial, they could assume that Barth would be a potential Government -- not a defense -- witness.

The first inkling that there was a factual issue on Buhler's ownership of the diamond came only after Buhler began to

testify. Only then did it become apparent that the Government had not substantiated -- or even investigated -- the facts it relied on to establish Buhler's legitimate ownership of the diamond. Once the issue jelled, counsel took all reasonable steps to secure Barth's testimony.

The Government's argument that defense counsel should have had the precognizance to know, before trial, that the Government never investigated Buhler's claim that he bought the diamond through Barth, puts a greater burden on the defense than the Government itself assumed in this case.

The remaining arguments by the Government have been dealt with at length in appellant's main brief, and counsel will not burden the Court with a reiteration of those arguments in this reply brief.

CONCLUSION

For all the foregoing reasons, as well as those given heretofore, the conviction appealed from must be reversed.

Respectfully submitted,

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Dated: New York, New York
December 9, 1976

I certify that two copies
of the certified reply brief were
served this date on the US
attorney for the So Dist of N.Y.
Dec 10, 1976 Arthur Bobe